Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1608

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IVAN BULJUBASIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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(a) The rule of law that justifies a denial of a severance is not applicable and cannot excuse the prejudice to petitioner, where a severance had to be granted; and the delay in granting the severance resulted in prejudice to the petitioner by permitting counsel for co-defendant to cross-examine petitioner and other witnesses. 2

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1.

Petitioner was denied his constitutional right to due process and a fair trial when the court forced him to proceed to trial with co-defendant Pavlovic, where that co-defendant asserted prior to trial that petitioner had threatened to use deadly force to coerce him to assist in the offense, where at trial co-defendant's opening statement affirmed this defense, and where counsel for co-defendant through his cross-examination of witnesses including

petitioner and presenting witnesses acted as an associate prosecutor whose strategy was designed to prove to the jury that petitioner was guilty.

(a) The rule of law that justifies a denial of a severance is not applicable and cannot excuse the prejudice to petitioner, where a severance had to be granted; and the delay in granting the severance resulted in prejudice to the petitioner by permitting counsel for co-defendant to cross-examine petitioner and other witnesses.[1]

A main thrust of the government's position is that prejudice to Buljubasic was not caused by the government and hence not error. Instead, they argue it was caused by the dilatory tactic of Pavlovic in waiting "for nearly a year after indictment before filing his severance motion" (Govt. Br. 18) that

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1. The government's reliance on Pavlovic's credibility is strange. Relative to this case, Pavlovic has pled guilty to having committed perjury.

asserted that Buljubasic coerced him to provide funds to Zabic. While such argument would be persuasive if Pavlovic was appealing, it lacks force when used to excuse the harm to Buljubasic. He was not dilatory. He had no way of knowing what fabrication Pavlovic would make. He had no control over his co-defendant. It is harsh, as well as so illogical as to violate due process, to make Buljubasic suffer prejudice due to the failure of a co-defendant to come forward with his concocted defense until immediately before trial.

On November 18, 1985, before trial, Pavlovic's attorney stated that Pavlovic would testify that Buljubasic by threatening him with guns coerced him to provide "arson money to pay Mr. Zabic." (App. A4, Tr. 1) The government argued

that Pavlovic should be prohibited from making this defense because it was being raised immediately prior to trial. The court disagreed, ruling that she would not "preclude raising that defense." (App. A4, Tr. 2-3) Although Pavlovic's attorney, in response to inquiry as to whether Pavlovic would testify, specifically advised the court that "Mr. Pavlovic is taking the stand." (App. A4, Tr. 6), the court denied the motion for severance. The motion was denied even though the court recognized that if Pavlovic presented his testimony as to coercion, "that would require a severance because that is definitely a defense ... incompatible with Mr. Buljubasic's defense." (Tr. 802) Hence, prior to the commencement of trial, the court was

advised of the very facts that ultimately caused the court to grant a severance.

The government claims that while the assertion of Pavlovic's defense counsel was a "representation of potentially 'antagonistic defenses'" (Govt. Br. 20) the judge had a right to disbelieve that such a defense would be presented because it had only recently been raised with sufficient specificity, and at other times, as when interviewed by federal agents and under oath before the grand jury and at Zabic's trial, Pavlovic had never made any reference to this matter. While Pavlovic's repeated failure to mention such alleged coercion previously certainly relates to the question of truthfulness of Pavlovic's testimony, the affirmative statement of Pavlovic's counsel that his client would

testify to Buljubasic's alleged coercion was sufficient basis to require the court to grant severance prior to trial. Any lingering doubt was dissipated at the onset of trial by Pavlovic's counsel's opening statement. He specifically referred to matters that he could present only through the testimony of his client: versions of conversations had between his client and Zabic, and versions of conversations between his client and Buljubasic, that were at total odds with what he knew Zabic and Buljubasic would testify to; the assertion that his client was afraid of Zabic and Buljubasic. (Tr. 65) The sole testimony to support these assertions had to come from Pavlovic himself. Hence, the trial court knew both prior to trial and on the first day of trial that Pavlovic intended to

testify to a defense which would require grant of severance, because Pavlovic's defense, if believed by the jury, would preclude the acquittal of Buljubasic.

Here, based on Pavlovic's defense, the court found it necessary to abort trial as to one of two defendants; fairness requires that the defendant who suffered prejudice due to a co-defendant's dilatory tactics be severed out, and that the dilatory co-defendant be required to proceed to trial. It is illogical and contrary to fundamental fairness to require Buljubasic to suffer the consequences of Pavlovic's presence in his trial both as an accusatorial co-defendant and as prosecutorial witness, where it was Pavlovic as defendant who was dilatory. Pavlovic's fault cannot

logically require the waiver of Buljubasic's due process rights.

The government asserts that the trial court's delaying the grant of the severance did not prejudice petitioner even though it permitted counsel for co-defendant to cross-examine government witnesses and the petitioner in a manner adverse to the interest of the petitioner. The position that there was no error because the examinations "did not add to the evidence already in the lists against petitioner" (Govt. Br., p. 8) involves closing one's eyes to what is a jury trial. A trial is not merely the submission of evidence to the jury; if it was, we would have computers and not jurors. Jurors are human beings; they are affected by innuendos and sarcasism. Prejudice occurs when the

defendant has his examination of a witness destroyed by co-counsel's examination of the same witness, when the defendant's credibility is damaged by the hostile cross-examination by co-counsel. Here, where normally co-counsel would not even have had the right to examine the petitioner[2] (United States v. Mercks, 304 F.2d 771 (4 Cir. 1962); United States v. Crockett, 41 CrL 2008 (4 Cir. 1987)), prejudice occurred.

The government, p. 8 of its Brief, admits that "Pavlovic's counsel buttressed the government's case against petitioner." The government asserts this is common in joint trials and such has

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2. The testimony of Buljubasic was not incriminating of Pavlovic. In substance, it was that he, Buljubasic, had nothing to do with setting the fire.

been held proper. However, in the case relied on by the government, there was no need for a severance. Here, a severance had to be and was granted. Prejudice which may be acceptable when the trial has to be joint is unacceptable where a severance must be granted.

Certiorari should be granted to resolve this issue.

2.

Neither the government's "separate matter distinction" nor its "passage of time distinction" avoids that there was a violation of the Doyle v. Hale Rule; nor can the error be excused as being inconsequential.

The error, the prosecutor relying on petitioner's silence and the court foreclosing petitioner from demonstrating the reason for his silence, was not inconsequential; the prosecutor thunderously argued to the jury that

petitioner's failure to report proved his guilt. The prosecutor argued:

> "And it is for that reason, ladies and gentlemen, that we put the significance that we do on his failure to report that he supposedly was being extorted ... He is not reporting because ... he is guilty of the crimes charged in this indictment." (Tr. 2876)

Here, where all incriminating witnesses were admitted accomplices or persons receiving a benefit for their testimony, this argument is not harmless error.

The government's assertion, p. 10 of its Brief, that petitioner was able to provide the same explanation for his conduct that he would have if he had been permitted to refer expressly to Miranda warnings is false. Silence after accusation, which normally carries an inference of guilt, lacks such inference

not merely because a person has been arrested, but specifically because he has been advised of his right to remain silent. United States v. Hale, 422 U.S. 171 at 177. Permitting the jury to know that petitioner was arrested would not have the same impact as having the petitioner testify to his reason for not reporting the incident, i.e., that he relied upon his Miranda warnings.

The government's argument that his "silence was in connection with a wholly separate matter" (Govt. Br., p. 9) is absurd. The extortion by Zabic was for money to appeal the arson conviction. Petitioner's reporting would relate petitioner's association with Zabic after his conviction. The government used this association as direct evidence of

petitioner's guilt. It was not a separate matter.

The opinion of the Court of Appeals that it was necessary to exclude petitioner's reason in order to also exclude testimony that police officers made ethnic slurs is erroneous. The trial court could have instructed petitioner that he could testify concerning the Miranda warnings while excising any reference to the ethnic slurs.

Petitioner's due process rights were violated when the government was permitted to rely on his silence while the petitioner was denied the right to explain the reason for his silence.

3.

Due process is violated where the petitioner is prevented from calling a witness who has exculpatory evidence by the government's refusal to grant use immunity where the sole interrogation of that witness would relate to a matter to which the witness has already pled guilty and where the government has presented its case primarily through the testimony of others granted immunity.

Neither United States v. Doe, 465 U.S. 605 (1984) nor Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) dealt with a situation as here. Applicable to this situation is this Court's holding that due process is violated where the defendant is prevented from presenting exculpatory evidence by the government's invocation of a procedural rule. Chambers v. Mississippi, 410 U.S. 284 (1973). The procedural rule that only the government can grant use immunity must, as the procedural rule in Chambers,

fall when in conflict with the compelling need of the criminal justice system to seek out the truth. New York v. Harris, 401 U.S. 222 (1971). Just as defendants cannot use the Fourth Amendment to foster perjury, Walder v. United States, 347 U.S. 62 (1954), so too the government should not be permitted to use its right to refuse to grant use immunity to prevent petitioner from bringing forth exculpatory evidence where there exists no valid reason to refuse the grant of use immunity. Here, there is no valid reason because the government loses nothing by granting use immunity against a co-defendant who had pled guilty, and when they had no real intent in prosecuting.

The government misconstrues the evidence when it asserts that Siprak's

testimony would not have been exculpatory. At the time Siprak pled guilty, there was inquiry concerning whether Siprak could assist the government against the petitioner by providing information. Siprak, through his attorney, related that although he desired to assist the government and desired a reduced sentence for such assistance, he could not provide information against the petitioner because to do so would be to lie.

The statements that the government asserts are inconsistent with Siprak's assertion that he did not know the petitioner and that petitioner was not present in direct contradiction to both Zabic and Pavlovic, were alleged statements made by Siprak to an investigator for Zabic which were never

affirmed by Siprak as being his statements.

Here, where all substantial witnesses against the petitioner had received de facto or de jure immunity, due process was denied by the government's tactic that resulted in excluding the crucial testimony of Siprak that disputed both Zabic and Pavlovic concerning petitioner's presence at a crucial meeting. Siprak's testimony would corroborate the petitioner's and demonstrate his innocence.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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